**CHIA SAW KEE & ANOR**

**v.**

**HUAH LEONG HOLDINGS SDN BHD & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: D4-22-783-1999]
25 AUGUST 2003

***CIVIL PROCEDURE:*** *Pleadings - Striking out writ and statement of claim - Grounds for striking out - Whether second defendant proper party to proceedings - Whether second defendant estopped from making application - Whether there was undue delay*

This was an appeal to the judge in chambers against the decision of the senior assistant registrar dismissing the second defendant's application to strike out the plaintiffs' writ of summons and statement of claim. The second defendant's ground for the striking out application was that it should not have been made a party to the proceedings as it was not a party to the share sale agreement between the plaintiffs and the 1st defendant. However, the plaintiffs argued that although the second defendant may not have been a party to the share sale agreement, it should not be excluded from the proceedings as the second defendant was a necessary and significant party to the proceedings. Further, the plaintiff also argued that the rights of the second defendant would be affected by the relief prayed for in these proceedings.

**Held (dismissing the appeal):**

**[1]** It was crystal clear that the second defendant's interests would be affected as a result of any orders that would be granted and thus the second defendant had properly been made a party to the action. (p 130 f)

**[2]** The second defendant had two options in this action. The first was to strike out this action and the second would be to defend and dispute the action. Since the second defendant had elected to defend and dispute the action, it could not now attempt to state that it should not be a party to this action. The principle of estoppel would be vigorously applied to the detriment of the 2nd defendant. (p 133 e)

**[3]** The issue of privity of contract had no relevance to the facts of the present case. (p 134 g)

**[4]** There was delay on the second defendant's part. The application to strike out the plaintiffs' writ of summons and statement of claim was not promptly made. It took three years for the second defendant to file the application. (p 131 h)

**Case(s) referred to:**

*A-G for Hong Kong v. Humphreys Estate (Queen's Gardens) Ltd [1987] 2 All ER 387 PC* ***(refd)***

*Chor Phaik Har & Ors v. Choong Lye Hock Estates Sdn Bhd & Ors [1996] 4 CLJ 141 CA* ***(refd)***

*Freeman v. Cooke [1848] 2 Exch 654* ***(refd)***

*Dillwyn v. Llewelyn [1862] 4 De GF* ***(refd)***

*Gillett v. Holt [1998] 3 All ER 917* ***(refd)***

*Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General of Trade Unions & Ors [1990] 2 CLJ 405 HC* ***(refd)***

*Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC* ***(foll)***

*London Passenger Transport Board v. Moscrop [1942] AC 332* ***(refd)***

*Pickard v. Sears [1837] 6 Ad & El 469* ***(refd)***

*Re Basham [1987] 1 All ER 405* ***(refd)***

*Willmott v. Barber [1880] 15 Ch D 96* ***(refd)***

**Other source(s) referred to:**

Zamir & Woolf, *The Declaratory Judgment*, 3rd edn, pp. 262-264

*For the 2nd defendant - Govin Sreedharan; M/s Choong & Co*

*For the plaintiffs - Maidzuara Mohammed (Wong Guo Bin); M/s Logan Sabapathy & Co*

*Reported by Izzaty Izzuddin*

## JUDGMENT

**Abdul Malik Ishak J:**

**Introduction**

This was a notice of appeal to the judge in chambers dated 24 March 2003 as seen in encl. 39 against the dismissal by the learned senior assistant registrar ("SAR") on 21 March 2003 of the second defendant's application to strike off the writ of summons and the statement of claim pursuant to the summons in chambers dated 25 June 2002 as seen in encl. 33.

Essentially and within a narrow compass, the second defendant's case in encl. 33 was based on the contention that the second defendant should not have been made a party to these proceedings given that the share sale agreement was between the plaintiffs and the first defendant. It was the stand of the second defendant that there was no privity of contract between the plaintiffs and the second defendant.

On the other side of the fence, the plaintiffs contended that whilst the second defendant may not have been a party to the share sale agreement, the second defendant should not be excluded from these proceedings because the second defendant is a necessary and a significant party to these proceedings. It was vigorously contended by the plaintiffs that the rights of the second defendant will be affected by the reliefs as prayed for in these proceedings.

Clearly the parties have divergent views in regard to the *status quo* of these proceedings as against the second defendant.

**The Legal Semantics**

Now, quite apart from the trite principle that a striking off order would only be allowed in clear cases, the law moves further and it provides that an order to strike off should not be allowed against a party that is necessary to a particular proceeding.

Edgar Joseph Jr J (as he then was) in the case of *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General of Trade Unions & Ors* [1990] 2 CLJ 405 was reluctant to strike off the action against the fourth defendant and at p. 410 of the report his Lordship succinctly stated:

> As for the fourth defendant, it would naturally be affected should the plaintiff succeed in obtaining the declaration that its registration as a trade union by the first defendant was a nullity. As such, it goes without saying that the fourth defendant is a necessary party to these proceedings and so the statement of claim clearly disclosed a cause of action against it. The plaintiff thus had the necessary *locus standi* to maintain the present suit against the fourth defendant as well.

In *Chor Phaik Har & Ors v. Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 4 CLJ 141, the question as to whether the appellant was a necessary and a proper party was answered by the Court of Appeal at p. 153 of the report in this way:

> That brings us to the second main point. The complaint made by the appellants, to recall, is that they have no interest in the proceedings and should not have been impleaded because the lands are all registered in the name of the company.

We think that the test to be applied in a case as the present is to ask the question: were the defendants (the appellants before us) necessary or proper parties? That question, when answered one way or another, will determine the point taken.

Looking at the facts once again, it is clear that the assertion by the appellants, by their conduct, that the deceased had an interest in the lands in question makes them necessary parties to the action. See, for example, *Shafto v. Bolckow Vaughan & Co* [1887] 34 Ch D 725.

On the facts of the present case, it was essential to have them before the court to deal with the interest they had always asserted. See *Thornhill v. Weeks* [1913] 1 Ch 438. Merely impleading the company would have been insufficient.

For these reasons, we reject the arguments advanced by the appellants upon the second point.

**The Plaintiffs' Case**

It would not be out of place to state briefly the plaintiffs' claim against both the defendants particularly the second defendant.

The plaintiffs' claim is for the payment under the share sale agreement whereby the plaintiffs contended that:

(i) the first defendant agreed with the plaintiffs to pay a sum of RM4 million to the plaintiffs; and as well as

(ii) the repayment of the sum of RM2.5 million that was made by the first plaintiff as a shareholder's advance.

The plaintiffs also contended that the shareholder's advance of the sum of RM2.5 million has not been paid. So the plaintiffs contended that if and in the event that the first defendant is found to be not responsible for the shareholder's advance, then the second defendant is obliged to repay the first plaintiff a sum of RM2.5 million that was advanced by the first plaintiff to the second defendant. In the statement of claim, the plaintiffs pray for a declaration that involves or affects the second defendant's interests in that all books, records, accounts and documents that belong to the second defendant is to be delivered to the plaintiffs. Prayer 3(e) of the statement of claim merits reproduction and I do so now:

All necessary and consequential relief including but not limited to an order that the first defendant do deliver up to the plaintiffs all books, records, accounts and other supporting documents of the second defendant relating to the Mixed Development Project in the control, possession and/or custody of the first defendant.

It is crystal clear that the declarations that are prayed for by the plaintiffs would clearly affect the second defendant's interests because if the said declarations are to be granted, the second defendant would have to deliver to the plaintiffs all books, records, accounts and documents that belong to the second defendant. It must be borne in mind that the said books, records, accounts and documents would contain important information pertaining to the second defendant that would affect the second defendant's interests. This is recognised by the law and it is so stated by Zamir & Woolf in their book entitled "*The Declaratory Judgment*", third edition at p. 262 to p. 264 thereof:

> The General approach
>
> The general rule is that it is desirable that all persons who appear to have a real interest in objecting to the grant of a declaration claimed in legal proceedings should be made defendants. As Viscount Maugham said (*London Passenger Transport Board v. Moscrop* [1942] AC, 332 at 345):
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> > The persons really interested were not before the court. It is true that in their absence they were not strictly bound by the declaration, but the courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties, whether by representation orders (For the power of the court to make representation orders, see CPR Part 19.6-19.9 CPR Part 19.10 to 19.15 make provision for group litigation and test cases. Where a Group Litigation Order (a 'GLO') is made an order on a GLO issue will bind all members of the group. Note *Morgan's Brewery Co. v. Crosskill* [1902] 1 Ch. 898, where the claim related to the construction of the articles of association of the claimant company and the court declined to appoint the defendant, a shareholder of that company, to represent the class of shareholders unless he was nominated by them to act on their behalf; the issue was ultimately determined as between the parties before the court) or otherwise, before a declaration by its terms affecting their rights is made. (Furthermore, it is 'undesirable that judges should make declarations as to the true construction of documents on motions for judgment in default of defence': *New Brunswick Ry. Co. v. British and French Trust Corp.* [1939] A.C. 1 at 22, per Lord Maugham L.C.; see also *ibid.* at p. 28, per Lord Russell of Killowen, and at page 38, per Lord Wright. In *Smith v. New Brunswick Human Rights Commission* [1999] 179 D.L.R. (4th) 28 the court noted that relief cannot be given against a non-party. For judgments on failure to give notice of intention to defend or in default of pleadings, see, generally, CPR Part 10.2 and CPR Part 12, respectively. Cf. *Clarke v. Chadburn* [1985] 1 All E.R. 212 (which was decided under the old rules). Today, if the Court is satisfied that it is

> appropriate to do so, taking into account the overriding objectives set out in CPR Part 1, it will grant a declaration in uncontested proceedings).

This is a sensible approach: first, as the court can take into account the interests of anyone who would be affected in reaching its decision as to whether or not to grant a declaration, it is only just that those who may be affected should be given an opportunity to present any argument which they want the court to take into account; secondly, a declaration will only bind the parties to the proceedings. (Under CPR Part 19.6 and 19.7 the judgment in the representative action binds the party represented unless the Court otherwise directs although it can only be enforced against a non-party with the consent of the Court. Under CPR Part 19.8A the Court may direct that a notice of claim be served on any person who may be affected by a judgment relating to the estate of a deceased person or trust property. If they decide not to join in the proceedings they will be bound by the judgment. See also the Administration of Justice Act 1985, s. 47). If, therefore, someone who should have been joined as a defendant is not joined, there will be a danger of having to bring fresh proceedings in which he is joined, involving the expense and delay simply to re-determine a question already decided in the previous proceedings and thirdly, it is important that there is someone before the court who will properly contest the issue. In *Metzger v. D.H.S.S.* [1977] 3 All E.R. 444 at 451 Megarry V.C. indicated the usual approach to the grant of declarations as to the law when he said:

> The court does not make declarations just because the parties to litigation have chosen to admit something. The court declares what it has found to be the law after proper argument, not merely after admissions by the parties. There are no declarations without argument: that is quite plain.

In *Aldrich v. Attorney-General* [1968] P. 281 at 295 Ormrod J expressed the position in this way:

> If I had jurisdiction to grant a declaration I would have to consider whether it would be right to grant it without proper contradictor. If the court has to adjudicate on an issue it will do so on the best evidence available. But it does not have to adjudicate on an issue when the sole relief sought is a declaration and it should not do so in cases where the evidence cannot be properly investigated and verified.

This is an application of the same principle which makes a court reluctant to grant a declaration without a trial unless to refuse to do so would be contrary to the interests of justice. (See *Wallersteiner v. Moir* [1974] 1 W.L.R. 991 and *Patten v. Burke Publishing Co. Ltd* [1991] 1 W.L.R. 541).

> Accordingly, the court will generally look with favour upon the joinder of all parties whose legal or equitable interests may be affected by the grant of a declaration even if they are not immediately involved in the act or transaction in issue.

And, according to the learned authors of the same book, the term "defendant" is used to include all those against whom proceedings are brought against and this would include any respondent.

Viscount Maugham writing a separate judgment for the House of Lords in the case of *London Passenger Transport Board v. Moscrop* [1942] AC 332 aptly said at p. 345 of the report:

> I also think it desirable to mention the point as to parties in cases where a declaration is sought. The present appellants were not directly prejudiced by the declaration and it might even have been thought to be an advantage to them to submit to the declaration, but, on the other hand, the persons really interested were not before the court , for not a single member of the Transport Union was, nor was that union itself, joined as a defendant in the action. It is true that in their absence they were not strictly bound by the declaration, but the courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made.

Factually speaking, it is crystal clear that the second defendant's interests would be affected as a result of any orders that would be granted pursuant to the plaintiffs' claim as reflected in the statement of claim and so, in my judgment, the second defendant has, properly, been made a party to this action.

**The Second Defendant's Defence**

The second defendant recognised its involvement and its liabilities and so the second defendant has taken positive steps and has advanced its case in its defence. In particular, the second defendant has advanced its case in the following manner:

(a) at para. 18(ii) of the statement of defence, the defendants including the second defendant have pleaded that pursuant to the second defendant's financial report, only a sum of RM167,000 has been paid by the first plaintiff as the shareholder's advance. The balance of the shareholder's advance for the sum of RM2,400,777.50 is denied as having been paid; and

(b) at para. 8(vi) of the statement of defence, the second defendant has pleaded that the plaintiffs have agreed, pursuant to cl. 8.4.2 of the share sale agreement to indemnify the second defendant in the event that the total debts and liabilities of the second defendant exceeds the amount of RM497,385. Based on that same clause – referring to cl. 8.4.2 of the share sale agreement, the second defendant has pleaded in paras. 22 and 25 of the statement of defence a defence of set off of, *inter alia*, the shareholder's advance claimed by the plaintiffs.

It is clear therefore that the above matters pleaded by the defendants could only be pleaded and advanced by the defendants, in particular, the second defendant because those matters relate to and connected to the second defendant's rights. That would be the reasonable inference to be drawn. Now, if indeed the defence as put forth is true, only the second defendant can rely on the defence of set off as pleaded given the fact that the said indemnity was only given to the second defendant under the share sale agreement.

Is the second defendant's application to strike out inconsistent with the second defendant's conduct?

I would readily answer this question in the positive.

The second defendant states that the statement of claim does not reveal any reasonable cause of action against the second defendant. The second defendant also states that it has stated at the outset at para. 32(iii) of the statement of defence that the plaintiffs do not have any cause of action against the second defendant (see para. 5 of the affidavit of Mahinder Singh a/l Jagat Singh that was affirmed on 20 June 2002 as seen in encl. 34). In the second defendant's affidavit in reply in encl. 36 that was affirmed by Mahinder Singh a/l Jagat Singh ("Mahinder Singh") on 13 August 2002, it was deposed at para. 9 that:

> ... the steps that the second defendant has taken so far in this action are only meant to preserve and protect its legal position after having been unnecessarily dragged in as a party to this action by the plaintiffs and do not constitute an opportunity to ventilate its case or any acceptance or recognition of the plaintiffs' right to bring legal proceedings against it. On the contrary, the defendants have maintained their right from the start in paragraph 32(iii) of the Statement of Defence and Counterclaim that the plaintiffs have no cause of action against the second defendant!

If it was true as to what Mahinder Singh had deposed to, it is interesting to note that the second defendant adopted a lackadaisical attitude and did not file an application to strike off the writ of summons and the statement of claim

for three years since this action was commenced on 22 March 1999. Instead, the second defendant has disputed numerous applications that were made by the plaintiffs. The first plaintiff (Chia Saw Kee) affirmed an affidavit on 23 July 2002 as seen in encl. 35 and there the sequence of events were categorically stated. In para. 5 of encl. 35, the first plaintiff deposed as follows:

> 5. At the outset, I wish to draw the following matters to the attention of this Honourable Court:
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> (a) the action herein was commenced on 22.3.1999;
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> (b) subsequently, the plaintiffs filed an application for the appointment of receivers and managers over the second defendant;
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> (c) additionally, the plaintiffs filed an application for summary relief under Order 14 of the Rules of the High Court, 1980;
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> (d) the defendants filed their Defence and Counterclaim on 29.6.2000 and the plaintiffs filed their Reply and Defence to Counterclaim on 25.9.2000;
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> (e) and order was made on 31.1.2001 pursuant to summons for directions for, *inter alia*, further and better particulars which were delivered on 6.2.2001;
>
> (f) both the plaintiffs and the defendants have filed their respective lists of documents;
>
> (g) pursuant to directions at case management, bundles of pleadings have been filed together with Statements of Agreed Facts and Issues for Trial;
>
> (h) the matter has been fixed for further case management on 28.8.2002 pending finalisation of documents by both sides which, to date, has been substantially agreed upon by the parties herein.

These are indeed interesting averments. The plaintiffs submit that the second defendant is now estopped from making the application to strike off given the fact that the second defendant has clearly shown its intention to defend this action by disputing numerous applications by the plaintiffs including the application for the appointment of receivers and managers for the second defendant as seen in encl. 4. Estoppel has now become an issue.

The principle of estoppel may generally be stated in this way. What a man has once alleged, by his words or conduct, he should not subsequently be allowed to contradict. So, estoppel operates to prevent a party to litigation from

asserting or denying certain facts. The cases of *Pickard v. Sears* [1837] 6 Ad & El 469; *Freeman v. Cooke* [1848] 2 Exch 654; *Dillwyn v. Llewelyn* [1862] 4 De GF & J 517; *Willmott v. Barber* [1880] 15 Ch D 96 at 105-106; *Re Basham* [1987] 1 All ER 405; *A-G for Hong Kong v. Humphreys Estate (Queen's Gardens) Ltd* [1987] 2 All ER 387, PC; and *Gillett v. Holt* [1998] 3 All ER 917 on estoppel should be referred to and they are certainly of great significance. Be that as it may, the Federal Court in *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305 said at p. 325 which must surely apply to the facts of the present case:

> In the context of litigation, it usually arises where a party to an action has at least two alternative and mutually exclusive courses open to him. If by words or conduct he elects to pursue one of them and thereby leads his opponent to believe that he has abandoned the other, he may, if the circumstances so warrant, be precluded from later changing course. Decisions upon the application of the doctrine to litigation are but mere illustrations of the broader proposition. Indeed, this is true of all cases where the doctrine has been applied to other spheres of human activity.

In my judgment, the second defendant had two options in this action. One was to either strike off this action filed against it or the other and the second option would be to defend and dispute this action. Since the second defendant had elected to defend and dispute this action, it cannot now attempt to state that it should not be a party to this action. The principle of estoppel would be vigorously applied to the detriment of the second defendant.

**The Issue Of The Privity Of Contract Not Relevant**

The second defendant contended that there is no privity of contract between the plaintiffs and the second defendant under the share sale agreement. In contending the way it did, the second defendant failed to recognise that it had been made the necessary party to these proceedings whose legal rights would be affected by the reliefs sought for by the plaintiffs. The statement of claim as alluded to earlier bear testimony to the importance of having the second defendant as a party to these proceedings. It is certainly hard to comprehend how the second defendant could possibly take an inconsistent stand that it is not a necessary party to these proceedings when the delivery up of the second defendant's books and other records as prayed for in prayer 3(e) of the statement of claim would severely affect the second defendant's interest.

The second defendant's present application to strike out the plaintiffs' writ of summons and the statement of claim was not promptly made. It took the second defendant three years before it filed encl. 33. It seemed that the second

defendant was prompted to file encl. 33 on the sole basis that Public Bank Berhad would withdraw its banking facilities if the second defendant remains a party to these proceedings. The affidavit of the first plaintiff (Chia Saw Kee) that was affirmed on 29 August 2002 as seen in encl. 37 should be referred to. There the first plaintiff deposed to the following set of facts:

> 5. In reply to paragraph 5 of Mahinder's 2nd affidavit, I am advised by the plaintiffs' solicitors and verily believe that the reasons as advanced in the said paragraph 5 are not good and valid reasons for the 2nd defendant's delay in taking out the application, inter alia, strike out the writ of summons and Statement of Claim against the 2nd defendant.
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> 6. In fact, an objective reading of the facts as disclosed by Mahinder's 2nd affidavit and the cause papers filed herein will indicate that:
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> (a) the 2nd defendant had throughout these proceedings recognised its involvement and had taken positive steps to defend the actions herein;
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> (b) in recognising and accepting its involvement and taking those positive steps, the 2nd defendant had not, for the past 3 years, chosen to pursue any striking out application;
>
> (c) notwithstanding this recognition and acceptance, the 2nd defendant is now changing its stand to say that it should not be (a) party to these proceedings solely on the basis that Public Bank Berhad ('Public Bank') will withdraw banking facilities if the 2nd defendant continues to be a party to the proceedings herein.
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> 7. I wish to state that the plaintiff is not aware of any relationship between the 2nd defendant and Public Bank or that Public Bank is threatening withdrawal of banking facilities said to have been granted to the 2nd defendant. The 2nd defendant's motives in making this application, taking into consideration its past conduct in the proceedings herein, is clearly questionable.

The sum total of it all would be this. That the issue of privity of contract has no relevance to the facts of the present case. The second defendant is, in fact, a necessary party to these proceedings.

**The Question Of Prejudice**

The second defendant's insistence to proceed with the appeal in encl. 39 has resulted in prejudice to the plaintiffs because the trial dates scheduled on 25 August 2003 and 26 August 2003 have been vacated. It was the stand of

the plaintiffs that the action had not only been set down for trial but preparations for trial were in progress with the agreed facts and the issues for trial being agreed upon and even the bundles of documents have been substantially agreed upon. The magnitude of the prejudice can never be imagined.

**The Delay Point**

On the issue of delay, I am of the view that it is not open to the second defendant to state that it was the plaintiffs who delayed the trial of this action by filing an O. 14 application. It was and is within the knowledge of the second defendant that the O. 14 application was withdrawn in order to facilitate an early trial of the action. On this point, I must refer to the affidavit of the first plaintiff (Chia Saw Kee) in encl. 37 at para. 8 where it was deposed that:

> 8. I refer to paragraph 6 of Mahinder's 2nd affidavit and find it surprising that the 2nd defendant is attempting to imply that the withdrawal of the Order 14 application has caused the proceedings herein to have been delayed. This is especially so when it is well within the knowledge of the 2nd defendant that the reason for such withdrawal was to facilitate an early trial as directed by the learned Judge. There is now produced and shown to me a letter dated 10.5.2000 by my solicitors to the 2nd defendant's current solicitors marked as exhibit 'CSK-1'.

To do justice, it is only fair that I should reproduce the letter dated 10 May 2000 from the plaintiffs' solicitors M/s Logan Sabapathy & Co addressed to the defendants' solicitors M/s Choong & Co marked as exh. "CSK1" of encl. 37. That letter was worded in this way:

> 1. We refer to the above matter and to the telephone conversation this morning between your Mr. P.C. Choong and our Mr. Rohan Sankey.
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> 2. As indicated at the mention of our client's application for summary judgment before the Senior Assistant Registrar on 3.5.2000, we are instructed by our clients to withdraw the said application for summary judgment in view of the order for early trial given by the Judge.
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> 3. We would be grateful therefore to ascertain you client's instructions on the question of costs viz the withdrawal of the said application. In addition, we suggest that directions as to the time frames for the filing and service of your clients' defence and pleadings subsequent thereto be recorded before the Senior Assistant Registrar at the forthcoming mention of this matter on 16.5.2000.
>
> 4. Kindly revert to us as soon as possible with your clients' instructions.

This very letter speaks a thousand words. It shows beyond per adventure that the plaintiffs were keen to have an early trial date and as a consequence thereto they were willing to withdraw the O. 14 application. The delay point, if at all, should point in the direction of the defendants.

**Conclusion**

For the reasons as adumbrated above, I must rule that the second defendant has been rightly and properly made the necessary party to these proceedings. I must therefore dismiss the second defendant's appeal in encl. 39 with costs. The second defendant must bear the costs and that costs should be payable to the plaintiffs forthwith.